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No. 94-742

Supreme Court, U.S.
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In The Supreme Court of the United States

October Term, 1994

HARLEYSVILLE LIFE INSURANCE COMPANY,

Petitioner,

vs.

NANCY MARDELL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY MEMORANDUM

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United States v. Burke, ____ U.S. ____, 112 S. Ct. 1867 (1992).....1, 2

Note: The parent company of Harleysville Life Insurance Company is Harleysville Mutual Insurance Company. Harleysville Life Insurance Company has no subsidiaries.

PETITIONER'S REPLY MEMORANDUM

On February 6, 1995, Mardell filed her response acquiescing, without discussion, in the grant of certiorari. Because the recently decided case of *McKennon v. Nashville Banner Publishing Co.*, 63 U.S.L.W. 4104 (No. 93-1543) (January 23, 1995) did not involve an analysis of whether the nature of the remedy afforded a plaintiff in ADEA (or Title VII cases) sounds in contract or in tort, there remains unresolved the applicability of the rule that contracts obtained by fraud (here résumé fraud) are voidable by the defrauded party.

The Third Circuit's opinion is premised on its analysis that damages remedies in Title VII and ADEA cases sound in tort. The opinion presumes that "the whole body of tort law" is the relevant framework and that the result reached must not "fl[y] in the face" of this law. 31 F.3d at 1231; see *id.* at 1234. But this reasoning is contrary to this Court's holding in *United States v. Burke*, __ U.S. __, 112 S. Ct. 1867 (1992) that Title VII's remedial scheme was not meant to redress a tort-like personal injury for purposes of federal income tax law. Although the Third Circuit's opinion pays lip-service to *Burke* by citing it in a footnote (31 F.3d at 1232, n.19), its quotation omits the significant following sentence:

> The fact that employment discrimination causes harm to individuals does not automatically imply, however, that there exists a tort-like "personal injury" for purposes of federal income tax law.

112 S.Ct. at 1873. Nor does the Circuit acknowledge that, at least where income taxes are concerned, this Court has held (in *Burke*) that backpay awards are not excludable as "damages received on account of personal injuries." This same issue in ADEA cases is now before this Court in *Commissioner of Internal Revenue v. Schleier*, No. 94-500, *petition for cert. granted*

November 11, 1994, in which the Solicitor General stated the government's position as follows:

> The ADEA, like the pre-1991 version of Title VII involved in *Burke*, does not represent a tort-type action for a personal injury.

Petition for Certiorari at 12.

Distinctions between remedies sounding in tort or in contract are significant in cases such as this where the evidence demonstrates fraud in the inducement and a potentially voidable contract of employment. Since résumé fraud is, as the Third Circuit observed, "a serious and recurrent problem facing employers," 31 F.3d at 1236, n.28, it is important to provide guidance to the circuits in dealing with this form of an "after acquired evidence" case.

Respectfully submitted,

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February 11, 1995